In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-119

KIMBERLY-CLARK CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

The Equal Employment Opportunity Commission brought this action in the United States District Court for the Western District of Tennessee. The complaint, which was based on a variety of charges filed with the Commission over a period of five years, alleged that petitioner discriminated on the basis of sex and race in many of its employment practices and policies.

The district court granted petitioner's motion for summary judgment (Pet. App. A24-A35). It ruled that the complaint was untimely, that portions of it were not properly supported by administrative charges, and that another portion could not be maintained because a private suit had previously been filed by the charging party.

The court of appeals reversed in an exhaustive opinion on which we principally rely (Pet. App. A1-A23). Its decision is correct, and further review is not warranted.

1. Petitioner contends (Pet. 10-11) that the prior filing of a private action with respect to a charge precludes the Commission from bringing its own action with respect to matters growing out of the same charge. As the court of appeals correctly held (Pet. App. A19-A22), however, neither the Act nor its legislative history supports that contention. Even if it were assumed that Congress meant to foreclose the filing of a separate action by the Commission "when the EEOC's action parallels that of the private party, raising no substantially different issues and seeking no relief other than for the private party," that would not mean that a separate action is precluded when, as in the present case, "[t]he EEOC's suit encompasses allegations that extend beyond [the] private complaint, both in the scope of concern and in the extent of relief sought" (*id.* at A22). In those circumstances, "it would not be duplicitous to allow both * * * suits to proceed, though consolidation might be thought appropriate" (*ibid.*).

The Eighth Circuit's decision in *Equal Employment Opportunity Commission* v. *Missouri Pacific R.R. Co.*, 493 F.2d 71, took a different view of the matter, but the conflict is one more of form than of substance. That court held that, "once the charging party has filed suit pursuant to a 'right to sue' notice, the Commission is relegated to its right of permissive intervention" (493 F.2d at 75). The panel also made clear, however, that it expected the district court to "permit intervention and enlargement of the scope of the action by the Commission if necessary to the rendering of full and complete justice" (*ibid.*).

The practical result in *Missouri Pacific*, therefore, was essentially the same as that here. The Sixth Circuit in the present case contemplated the filing of a separate action by the Commission which would be consolidated with the private action; the Eighth Circuit contemplated the Commission's intervention in the private action and an appropriate broadening of the scope of the proceeding to accommodate the Commission's claims. Although we agree with the Sixth Circuit that the proper procedure "is not to expand the concept of intervention beyond its normal meaning, but to allow the EEOC to bring suit based on the findings that its investigation warrants" (Pet. App. A23, n. 15), either procedure would permit the Commission to pursue its complaint without subjecting the defendants to duplicative judicial proceedings. So long as intervention is freely permitted in the Eighth Circuit, and so long as the proceedings are properly "enlarge[d]" (493 F.2d at 75) to accommodate the Commission's action, the abstract disagreement between the two courts of appeals need not be resolved by this Court.

2. Petitioner argues that the Commission is precluded from filing suit "by res judicata or collateral estoppel where a charging party has sued and the suit has been settled or adjudicated on the merits" (Pet. 11). The court of appeals correctly held (Pet. App. A17-A19), however, that the Commission was not privy to the settlement agreement involved here, did not agree to it, and accordingly "is not barred by the doctrine of res judicata from basing its complaint on charges of discrimination which it never agreed to settle" (*id.* at A18). "[T]he EEOC sues to vindicate the public interest, which is broader than the interests of the charging parties" (*ibid.*), and it would be inconsistent with the Act's enforcement scheme to foreclose the Commission from vindicating that broader

public interest merely because the private parties have settled their own charges against the defendant in a way that is satisfactory to them.[1]

3. Petitioner contends (Pet. 13-16) that the Commission's action is barred because it failed to notify petitioner that conciliation had failed with respect to one set of charges on which the Commission's complaint was based. The Commission, however, had attempted to conciliate other groups of similar sex discrimination charges and had notified petitioner that conciliation had failed with respect to those charges. As the court of appeals correctly found, petitioner "was apprised of the imminence of suit concerning sex discrimination charges prior to [the Commission's] suit" and "suffered no significant prejudice by not being notified of the failure of conciliation on the 'Williams group' of charges as well, since these charges concerned substantially identical issues of company practices" (Pet. App. A16).

Thus, while "[t]he EEOC should, of course, follow its own procedures as it conciliates charges" (*ibid.*), the failure to give notice on the one set of charges here was harmless error. As the court of appeals stated, "[w]hen an agency neglects to follow a procedural rule but its failure inflicts no significant injury on the party

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[1]Moreover, as the court of appeals stated, the settlement related only to one group of administrative charges. The Commission's complaint was also based on two other groups of similar charges, which themselves "form an adequate basis for an EEOC suit alleging sex discrimination by [petitioner]" (Pet. App. A18). For the same reason, the court of appeals correctly held that there is no need to consider here whether the Commission's failure to make a finding of reasonable cause with respect to the charges that were settled precludes the Commission's reliance on them in this action (see Pet. App. A19, n. 13).

entitled to observance of the rule, the error does not prevent further administrative or judicial action" (*id.* at A16-A17).[2]

4. Petitioner argues (Pet. 16-18) that the 1972 Amendments to Title VII of the Civil Rights Act of 1964, 78 Stat. 259, which for the first time authorized the Commission to file a civil action when conciliation has been unsuccessful, are inapplicable to the charges in the present case because the charges were not "pending with the Commission on the date of enactment" within the meaning of Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 113. The contention is that the "charges," having been investigated and given case numbers at the time the 1972 Act took effect, had passed from the status of "charges" to that of "cases."

As the court of appeals correctly stated, however, petitioner's "argument is an exercise in linguistic sophistry" (Pet. App. A5). The distinction between a "charge" and a "case" under Commission regulations "is purely for internal administrative purposes and is clearly not controlling when considering what Congress meant by 'charges' in enacting the 1972 amendments" (*id.* at A5, n. 3). "There is no indication in the legislative history that Congress was making the 'charge-case' distinction in applying the 1972 amendments to pending 'Charges' " (*id.* at A5), and there is no reason why it would have wished to do so.

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[2] *Equal Employment Opportunity Commission* v. *Hickey-Mitchell Co.*, 507 F.2d 944 (C.A. 8), relied upon by petitioner (Pet. 12, 15), is not in conflict with the present decision. There were no parallel charges involved in *Hickey-Mitchell*, and the court of appeals there, in contrast to the court here, was unable to "conclude that the Employer was not prejudiced" by the failure to give notice (507 F.2d at 948). The different results simply reflect the different records in the two cases.

5. Petitioner finally contends (Pet. 19-21) that the Commission's suit is barred because it was not filed within 180 days from the filing of the administrative charges or within the one-year state statute of limitations. The court of appeals addressed both issues exhaustively (Pet. App. A6-A15) and correctly concluded that "[t]he EEOC is not barred from basing a complaint on a charge filed more than 180 days prior to the EEOC's suit" (*id.* at A14) and that, "[i]n the absence of congressional intent to apply state statutes of limitations, such restrictions do not apply to the EEOC" (*id.* at A14-A15).

As petitioner acknowledges (Pet. 20), its contention with respect to the 180-day limitation period has been rejected by every court of appeals that has considered the issue. *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, 502 F.2d 153 (C.A. 4), certiorari denied, 420 U.S. 946; *Equal Employment Opportunity Commission* v. *Louisville and Nashville R. Co.*, 505 F.2d 610 (C.A. 5), certiorari denied, October 6, 1975, No. 74-1294; *Equal Employment Opportunity Commission* v. *E.I. duPont de Nemours & Co.*, C.A. 3, No. 74-1677, decided May 9, 1975; *Tuft* v. *McDonnell Douglass Corp.*, C.A. 8, No. 74-1890, decided May 27, 1975. We fully stated our views with respect to this issue in our Memorandum in Opposition to the petition for a writ of certiorari in *Cleveland Mills* (No. 74-607), and we rely here on that Memorandum.[3]

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[3]We are sending a copy of the Memorandum to petitioner's counsel.

With respect to the state statute of limitations issue, petitioner relies (Pet. 19) on *Equal Employment Opportunity Commission* v. *Griffin Wheel Co.*, 511 F.2d 456 (C.A. 5), which held that insofar as a complaint filed by the Commission "seeks recovery of back pay it is private and not public in nature and is subject to the [applicable state] statute of limitations" (511 F.2d at 459). That case, however, was decided by the Fifth Circuit prior to this Court's decision in *Albemarle Paper Co.* v. *Moody*, Nos. 74-389, *et al.*, June 25, 1975, in which the Court stated that back pay awards have "an obvious connection with" (slip op. 11) the central objective of Title VII to eradicate employment discrimination throughout the economy. "It is the reasonably certain prospect of a backpay award," the Court stated, that provides employers an "incentive to shun practices of dubious legality" (*ibid.*). Now that this Court has identified the public importance of back pay relief under Title VII, the Fifth Circuit may have occasion to reconsider its holding in *Griffin Wheel.*

In any event, this is not an appropriate case in which to resolve the alleged conflict between the courts of appeals on this issue. The Fifth Circuit's opinion in *Griffin Wheel* stated that, in determining the date on which the cause of action accrued for purposes of the applicable statute of limitations, the court must determine "the date of the last act of discrimination" (511 F.2d at 459). Since the Commission's complaint in this case alleged continuing violations by petitioner, it was timely filed with respect to the back pay request even under the *Griffin Wheel* standard.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

ABNER W. SIBAL,
General Counsel,

JOSEPH T. EDDINS,
Associate General Counsel,

BEATRICE ROSENBERG,
CHARLES L. REISCHEL,
BETH L. DON,
Attorneys,
Equal Employment Opportunity Commission.

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